United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

74-2559

United States Court of Appeals

SECOND CIRCUIT

RAYMOND MILLS,

Plaintiff-Appellant,

against

THE LONG ISLAND RAIL ROAD COMPANY, and HAROLD J. PRYOR, THOMAS J. BUTLER, WALTER DAY, MERRILL J. PIERCE, MARTIN BURKE, JAMES MOON and SAL BARBUTO, constituting a majority of the Officers of the UNITED TRANSPORTATION UNION (T),

Defendants-Appellees.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THE LONG ISLAND RAIL ROAD COMPANY

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Preliminary Statement

Plaintiffs Raymond Mills and Harry F. Simmons commenced this action by the service on May 21, 1974, of a summons and complaint and order to show cause signed by the Honorable William R. Geiler, Justice of the Supreme Court of the State of New York, County of Suffolk, under date of May 20, 1974. The order to show cause, returnable May 30, 1974, at Supreme Court, Suffolk County, sought a preliminary injunction enjoining the defendants from enforcing or taking any action with respect to certain letter agreements dated June 4, 1973 and December 14, 1973, and ordering the defendant, The Long Island Rail Road Company (hereinafter "LIRR"), to reinstate the plaintiff, Harry F. Simmons, to his position pending the outcome of a trial

of the issues. The May 20, 1974 order to show cause also contained an *ex parte* stay enjoining and restraining the defendants "from proceeding with any disciplinary action *presently pending* against the plaintiffs as a result of alleged violations of the aforementioned letter agreements. . . ." (emphasis added)

The LIRR, by notice dated May 28, 1974, made a cross-motion for an order dismissing the complaint on the ground that the Supreme Court, Suffolk County, had no jurisdiction over the subject matter and that the pleadings failed to state a cause of action, or in the alternative, for summary judgment dismissing the complaint.

On the return date, May 30, 1974, the Supreme Court, Suffolk County, was unable to hear oral argument and directed that the matter be adjourned to June 13, 1974. Since the statutory period for the removal of such an action from the State Court to Federal Court would have expired by that date, the defendants, on June 3, 1974, filed a petition for removal, along with an appropriate bond.

Under date of June 11, 1974, the United States District Court, Eastern District of New York, by the Honorable Orrin G. Judd, upon the application of plaintiffs, issued an order to show cause why the action should not be remanded back to the Supreme Court, Suffolk County, or in the alternative, why the relief requested by plaintiffs in the May 20, 1974 order to show cause signed by the Honorable William R. Geiler should not be granted. Although not a part of any formal motion Plaintiff Mills in his affidavit in support of the motion to remand also suggested that the District Court find the LIRR in contempt of Court for an alleged violation of the stay issued by the Supreme Court, Suffolk County on May 20, 1974.

The defendants then renewed their motions in opposition to plaintiffs' application for the relief requested in the May 20, 1974 order to show cause. In addition, the

defendants renewed their motions before the District Court to dismiss the complaint or in the alternative, to have summary judgment granted in their favor.

A hearing was held on June 14, 1974, before the Honorable Orrin G. Judd, United States District Judge at which time evidence was received, oral argument heard and memorandum filed following which decision was reserved.

By decision and order dated November 1, 1974, the United States District Court, Eastern District of New York denied the plaintiffs' motion to remand, denied plaintiff Mills' suggestion that the Railroad be held in contempt and granted defendants' motion for summary judgment dismissing the complaint.

Plaintiff Mills on November 21, 1974 appealed to this Court from so much of the final judgment entered in this action on November 1, 1974 as directs judgment dismissing the complaint.

Plaintiff, Harry F. Simmons, has not appealed.

Statement of Facts

The defendant, LIRR, is a common carrier by railroad engaged in interstate commerce and, as such, is subject to the provisions of the Interstate Commerce Act, the Railway Labor Act, the Federal Employers' Liability Act, and all other federal legislation regulating or affecting common carriers by railroad engaged in interstate commerce. The defendant, United Transportation Union, is a labor union that has been certified by the federal National Mediation Board, pursuant to the provisions of the Railway Labor Act (45 USC § 151, *et seq.*), as the collective bargaining agent for, *inter alia,* trainmen, collectors and conductors employed in the train service of the LIRR. Pursuant to the provisions of the Railway Labor Act, the United Transportation Union (hereinafter "Union") entered

into negotiations with the LIRR which culminated in a collectively bargained agreement dated February 17, 1972.

The procedure concerning discipline is contained in Article 42 of the agreement which specifies in paragraph (a) that "Employees shall not be suspended or dismissed from service without a fair and impartial trial." Article 42 further provides that an employee may be represented at the trial, that the employee and the General Chairman of the Union shall be supplied with copies of the trial record, that the decision of the Superintendent may be appealed for a hearing before an arbitrator appointed by the American Arbitration Association and that an employee who has been held out of service and thereafter exonerated shall be reinstated with his seniority unimpaired and shall be compensated for the earnings he would have received.

As permitted by the Railway Labor Act, the LIRR and the Union modified the collective bargaining agreement by entering into a letter agreement under date of June 4, 1973 setting up procedures designed to provide for an expeditious handling of disciplinary cases arising from "run failures," i.e., for *unexcused* absence from duty at the time an employee's train is scheduled to depart. This letter agreement was executed by Walter L. Schlager, President of LIRR and Harold J. Pryor, General Chairman of the Union. Pursuant to the letter agreement, an employee was now given a talk session with the appropriate Assistant Superintendent for his first run failure and received merely a reprimand for his second run failure. Before this letter agreement was signed, according to the uncontradicted testimony, an employee could be dismissed or suspended for his first run failure, and the Railroad could count run failures for his entire career and not just for the immediate twelve month period (103a, 104a).

The agreement further provides that for a third run failure, an actual fifteen days' suspension would be automatically imposed, that for a fourth run failure an employee

would receive an automatic 30 days' suspension while a fifth run failure within a twelve month period would result in dismissal from service. The letter agreement also provides that any run failure more than twelve months old will not be counted and will be deleted from the employee's record. In the event an employee felt he had a valid excuse which the LIRR for one reason or another refused to accept or recognize he retained his right to appeal his suspension or dismissal to an impartial tribunal, the American Arbitration Association, pursuant to Article 42(k) of the collectively bargained agreement.

A second letter agreement was executed by the LIRR and the Union on December 14, 1973. This agreement gave an employee the right to a formal hearing before he could be discharged for a fifth run failure within a twelve month period (30a).

Plaintiff Mills incurred a 15 day suspension for a third run failure on April 8, 1974, and an additional 30 day suspension for a fourth run failure on April 14, 1974. The imposition of discipline in both of those instances was deferred while plaintiff Mills commenced an appeal to the American Arbitration Association pursuant to the provisions of the letter agreement dated June 4, 1973. While such arbitration was pending, plaintiff Mills together with plaintiff Simmons commenced the instant action. Subsequent to the commencement of this action and the service of the order to show cause and stay on May 21, 1974, plaintiff Mills, on May 31, 1974, incurred the discipline of dismissal for a fifth run failure and, accordingly, was removed from service.

ARGUMENT

POINT I

The Court below correctly held that plaintiff failed to exhaust his administrative remedies.

(a) Plaintiff failed to exhaust his administrative remedies under the Railway Labor Act.

The plaintiff herein contends that he has been suspended in contravention of Article 42(a) of the collectively bargained agreement entered into by the LIRR and the Union to which he belongs. In order to facilitate the handling of such situations, Congress enacted the Railway Labor Act (45 U.S.C. Section 151 *et seq.*). Its express purpose is to settle disagreements between carriers and their employees so as to insure the smooth functioning of the carrier while operating in interstate commerce. 45 U.S.C. Section 152 (First).

Pursuant to this Act, it is well settled that "minor disputes"—those arising out of the interpretation or application of railway collective bargaining agreements—must be submitted to arbitration before the National Railroad Adjustment Board and that this statutory grievance procedure is a mandatory, exclusive and comprehensive system for resolving disputes. 45 U.S.C. Section 153 (i); *Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville RR Co.*, 373 U.S. 33, 38 (1963); *Walker* v. *So. R. Co.*, 385 U.S. 196, 198 (1966). *Westermayer* v. *Pullman Co.*, 360 F. Supp. 631 (N.D Ill. 1973).

Section 153 (i) provides that:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall

> be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

As the Supreme Court stated in *Andrews, supra:*

> ". . . the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." *Id.* at 322.

The dispute in the case sub judice is clearly within this statutory mandate.

Plaintiff relies upon *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1968), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), to support his contention that the instant case is an exception to the doctrine of exhaustion of remedies under the Railway Labor Act. The *Glover* case involved charges that certain employees were victims of invidious racial discrimination in job assignments. As the court below noted:

> "It was the special nature of racial discrimination charges and the absence of real administrative remedies which excused petitioners in that case from exhausting non-judicial remedies." (125a)

Vaca v. *Sipes, supra,* involved a breach of the union's duty of fair representation under the National Labor Relations Act and is, therefore, not applicable to the instant case.

Mr. Mills argues that since his complaint charges defendants with violating his constitutional right to proce-

dural due process, he can institute a lawsuit without exhausting his administrative remedies under the Railway Labor Act. This line of reasoning was specifically rejected in *Dorsey* v. *Chesapeake Railway Co.*, 476 F. 2d 243 (4th Cir. 1973). See also: *Ciacio* v. *Eastern Air Lines Inc.*, 354 F. Supp. 1272 (E.D.N.Y. 1973); *West* v. *American Air lines Inc.*, 352 F. Supp. 1278 (N.D. Ill. 1972).

In the *Dorsey* case, as in the instant case, a railroad employee claimed that he was wrongfully discharged in violation of his constitutional right to procedural due process. It was argued that the Supreme Court in *Andrews* v. *Louisville & Nashville RR.*, 406 U.S. 320 (1972), left undecided the question whether a wrongful discharge complaint alleging a constitutional violation should be exempted from the exhaustion requirement.

The Court in *Dorsey* stated:

> "We conclude that *Andrews* is controlling and that the district court properly found that Dorsey was required to exhaust his remedies with the NRAB before bringing suit in federal court." 476 F. 2d at 245.

Plaintiff Mills asserts that the court below erred by refusing to determine whether the Railroad was a public corporation subject to the same constitutional limitations of any other public agency. This argument is baseless because the Railway Labor Act and its procedures applies to any common carrier by railroad engaged in interstate transportation whether or not owned or operated by a state. *California* v. *Taylor*, 353 U.S. 553, 566-67 (1967). Further, the procedure before an impartial neutral pursuant to the Railway Labor Act, in the absence of fraud or lack of jurisdiction, corrects any defects on the company hearing level and constitutes due process of law, *D'Elia* v. *New York, New Haven and Hartford R. Co.*, 338 F.2d 701 (2nd Cir. 1964), see also: *Rossa* v. *Flying Tiger Line, Inc.*, 187F. Supp. 386 (N.D. Ill. 1958); *Otto* v. *Houston Belt and Ter-*

minal Ry. Co., 319 F. Supp. 262 (S.D. Texas 1970), aff'd 444 F. 2d 219 (5th Cir. 1971), cert. denied, 404 U.S. 984 (1971); *Brooks* v. *Chicago R. I. & P. R. Co.*, 177 F. 2d 385 (8th Cir. 1949).

(b) Plaintiff failed to exhaust his internal union remedies.

Plaintiff Mills alleges that the letter agreements of June 4, 1973, and December 14, 1973, are invalid because they were made by the General Chairman of the Local without approval by the General Committee of Adjustment or the members of the Union. This argument is completely without merit. Pursuant to the constitution and by-laws of the United Transportation Union, Mr. Harold J. Pryor, as the General Chairman, had full and complete authority to negotiate and enter into such agreements.

Article 85 of said constitution provides that:

> "General Committees of Adjustment shall have authority to make and interpret agreements with representatives of transportation companies covering rates of pay, rules or working conditions." (33a)

Article 85 then goes on to state that:

> "Between sessions of the General Committee of Adjustment, the Chairman of such Committee shall exercise all rights, privileges and authority vested in the General Committee, except as otherwise directed by the General Committee while in session." (33a)

Mr. Pryor is the Chairman of the General Committee of Adjustment and the record herein does not disclose any evidence or allegation that the General Committee had issued any direction prohibiting or restraining Mr. Pryor from entering into an agreement with the LIRR.

At the time these letter agreements were executed, Mr. Mills was the Local Chairman-Passenger of Local 645 of

the United Transportation Union and a member of its General Committee of Adjustment.

Article 75 of the Union constitution sets forth the internal appeal rights of its members and provides that an officer or member of a local may appeal an action of the General Chairman to the General Committee of Adjustment, and that an appeal from a decision of the General Committee of Adjustment may be made to a Board of Appeals. However, Mr. Mills not only did not utilize this procedure but he failed to file any appeal with his Union objecting to the 1973 letter agreement (111a, 112a).

POINT II

The Railroad has not violated the stay issued by the New York Supreme Court.

On May 20, 1974, the Honorable William R. Geiler, Justice of the Supreme Court of the State of New York

> ORDERED, that pending a hearing on this motion the defendants hereby be and hereby are enjoined and restrained from proceeding with any disciplinary action presently pending against the plaintiffs as a result of alleged violations of the aforementioned letter agreements of June 4, 1973, and December 14, 1973.

Plaintiffs alleged in the affidavits proffered in support of their order to show cause that the Railroad violated Judge Geiler's order and should be held in contempt. This allegation is completely without merit.

Prior to the issuance of the above order, plaintiff Simmons was subject to dismissal and plaintiff Mills was subject to suspension as a result of a series of run failures. The defendants were enjoined from proceeding with any disciplinary action presently pending on these charges. On May 31, 1974, eleven days after the issuance and service of

the order, plaintiff Mills committed yet another run failure and, under the terms of the applicable agreement, became subject to automatic dismissal. The stay issued in Supreme Court did not give plaintiffs free rein to contemptuously violate the rules and regulations of the Railroad and it did not purport to restrain the Railroad from proceeding with any disciplinary action for future violations of the Railroad's rules by these plaintiffs. It was on the subsequent run failure that the additional discipline was assessed and, therefore, the Railroad has not violated the stay issued in Supreme Court and should not be held in contempt.

However, even if this Court should find that the Railroad technically violated the stay, the Railroad could not be held in contempt since the State Court was without jurisdiction to issue the injunction *ab initio*. Under the Railway Labor Act, Congress has established a comprehensive plan for the settlement of labor disputes within the railroad industry. By the enactment of this statute, Congress has preempted the field and, consequently, the State Court had no power to issue the stay. As the Supreme Court held in *In Re Green*, 369 U.S. 689, 692 (1962):

> "A state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption."

Therefore, even if the Court should find that the Railroad has violated the stay, the stay was void in its inception and the Railroad may not be held in contempt.

CONCLUSION

The Decision of the District Court below should be affirmed in all respects.

Respectfully submitted,

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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND MILLS,

PL AP

VS.

THE ONG ISLAND RAILROAD, et al,

def-appellees.

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

Harold Dudash, being duly sworn deposes and says that he is the attorney agent for George M. Onken, for the above named defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland Avenue, Bronx, N.Y.

That on the 25th day of february, 1975, he served the within brief on behalf of the defendant-appellee

Upon:
Joseph P. Nappoli, 100 Church Street, New York, N.Y. 10007
Thomas J. Higgins, 200 South Service Road, Roslyn Heights, N.Y. 11577
upon the attorneys for the parties and at the addresses as specified below

by depositing three copies each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 25th day of february, 19 75

Harold Dudash

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 75

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